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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 84

MOHAWK REFINING CORPORATION, A CORPORATION, AND JOHN E. C. STROUD, C. KENNETH JOHNES, AND WILLIAM L. ASHBY, INDIVIDUALLY AND AS OFFICERS OF MOHAWK REFINING CORPORATION, PETITIONERS

v.

FEDERAL TRADE COMMISSION

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals affirming the Federal Trade Commission (Pet. 1a–8a) is reported in 263 F. 2d 818. The opinion and order of the Commission are set forth in the Joint Appendix (R. 37–42).[1]

JURISDICTION

The judgment of the Court of Appeals was entered on March 3, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] References are to the Joint Appendix printed for the use of the Court of Appeals and filed by petitioners in this Court pursuant to Rule 21 (3) and (4).

QUESTION PRESENTED

The Federal Trade Commission enjoined the sale or distribution of petitioners' motor oil, which was re-refined from used oil, in the absence of an affirmative disclosure in petitioners' advertising and on the containers in which the oil was sold that it was produced from used rather than crude oil. It found that, although there is no demonstrable difference between the quality of petitioners' oil and oil refined from crude oil, there is a public preference on the part of both dealers and motorists for oil refined from crude oil, and that sale of petitioners' product, without disclosure of the fact that it is refined from used oil, has the tendency and capacity to deceive its purchasers.

The question presented is whether, under these circumstances, the Commission could properly conclude that the failure of petitioners to make an affirmative disclosure of the source of their oil constituted an unfair method of competition or an unfair or deceptive practice under Section 5 of the Federal Trade Commission Act.

STATUTE INVOLVED

The pertinent provisions of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. 45) are as follows:

> Sec. 5(a)(1) Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * * *
>
> Sec. 5(a)(6) The [Federal Trade] Commission is hereby empowered and directed to pre-

vent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

* * * * *

STATEMENT

This is a proceeding, under Section 5 of the Federal Trade Commission Act, charging petitioners with unfair competition and deceptive acts and practices in the sale of lubricating oil re-refined from used oil. Petitioners' oil is sold in containers of the same general size, kind and appearance as those used for oil refined from crude oil, without any disclosure, either in advertising or on the containers, as to the source of such oil.

Petitioners are engaged in the business of producing motor lubricating oil by cleaning, reprocessing and re-refining used motor oil obtained from automobile crankcase drainings and other sources. The used oil is subjected to a series of processes designed to remove the impurities accumulated during its prior use. Sometimes, in order to meet varying viscosity requirements, petitioners blend the oil thus produced with oils refined from crude oil. The oil is then sold in interstate commerce to jobbers and retailers for resale to the public in one-quart and two-gallon containers and in bulk under various brand names. Petitioners' sales in interstate commerce are substantial and petitioners compete with various other manufacturers of lubricating oil.

No writing appears on the containers in which petitioners' products are distributed, stating or suggesting in any manner that the oil has been processed in

whole or in part from previously used oil (R. 37). The containers are like those used by refiners of crude oil, and the oil itself is indistinguishable in appearance from oil refined from crude (*ibid.*).

Undisputed testimony in the Commission hearings indicated that both jobbers (R. 137) and retail dealers (R. 45, 67, 170), as well as members of the purchasing public (R. 183, 186), were led to believe that they were purchasing oil refined from crude oil when they bought petitioners' products. The evidence at the hearing also made clear, as both the examiner (R. 33) and the Commission (R. 38) found, that members of the consuming public, as well as retail dealers who advise the public regarding the purchase of motor oil (R. 289, 316–317), prefer oil refined from crude oil to oil re-refined from used oil (R. 44–45, 67, 136, 158, 171). There was no "charge or implication" in the record that the motor oil produced by the petitioners from used oil was inferior to that produced from crude oil (Pet. 3a).[2]

Upon the basis of this evidence, the examiner found that the petitioners had "deceived and misled" many purchasers into buying their oil in the belief that it

[2] The examiner rejected evidence relied upon to show that crude and re-refined oil cannot be differentiated from a laboratory or specification standpoint, that the oil industry generally does not disclose the nature or geographic source of its raw materials, and that the source is not regarded in the trade as relevant to the oil's quality and value (R. 34, 242–243). The Commission upheld this exclusion on the ground that the quality of the petitioners' oil was not material to the issue of public preference for new or crude oil or to whether the public was deceived in the exercise of this preference (R. 40). The Court of Appeals expressly concurred (Pet. 6a).

had been refined from crude oil and that this action had "unfairly" diverted a substantial amount of business to petitioners (R. 35). The Commission unanimously adopted the examiner's findings and conclusions, although it modified his proposed cease and desist order in particulars not relevant here (R. 37–41).

The Court of Appeals, affirming the order of the Commission, found that (263 F. 2d 818, 820–821):

> The evidence shows also that without notification to the trade and to the customer that the petitioners' oil was not manufactured from crude oil, virgin oil, many persons in the trade and individual customers thought that the petitioners' product was manufactured from crude oil. The record proves further that such persons preferred to distribute and sell and to buy lubricating oil manufactured from crude oil or virgin oil, and not oil re-refined from crankcase oil, and thought that they were doing so. Accordingly, there was sufficient evidence upon which the Commission could find that dealers and the purchasing public were misled by a mistaken belief that petitioners' products were derived from crude oil.

The court also held (263 F. 2d at 821) that it was "beside the point" that "petitioners' oil is as satisfactory for lubricating purposes as [that] produced from crude oil" since "[a] manufacturer may not surreptitiously substitute his judgment for that of the purchaser as to the article to be purchased, even if the manufacturer's judgment is equal or even superior to that of the dealer or the customer. * * * The

public has the right to purchase motor oil manufactured from crude oil, if it desires to do so, and that desire may not be balked by a failure to disclose pertinent facts."

ARGUMENT

This case, one of a series in which the courts of appeals have uniformly affirmed Commission determinations that failure to disclose the used-oil source of motor oils offered for public sale violates Section 5 of the Federal Trade Commission Act,[3] involves no novel or significant question of law warranting review by this Court.

As petitioners concede, misrepresentation can flow from failure to speak as well as from affirmative misstatement. See *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F. 2d 52, 58 (C.A. 4); *L. Heller & Son, Inc.* v. *Federal Trade Commission*, 191 F. 2d 954 (C.A. 7). They also agree (Pet. 8) that a misrepresentation is no less a violation of the Act because the quality of the misrepresented goods equals that of the product which the public believes it is being offered. See *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67. Their case thus comes down to the suggestion that there was no adequate showing that the public's purchasing habits were influenced by the misrepresentation. But this contention cannot stand against the Court of Appeals'

[3] See *Royal Oil Corp.* v. *Federal Trade Commission*, 262 F. 2d 741 (C.A. 4); *Frank A. Kerran, etc., d/b/a Double Eagle Refining Co.* v. *Federal Trade Commission*, 265 F. 2d 246 (C.A. 10); petition for a writ of certiorari pending, No. 425, this Term.

express holding (affirming the similar findings of the Commission (R. 38) and its examiner (R. 33)) that "the record amply demonstrates a desire on the part of [some of] the dealers and purchasing public not to dispense or buy motor oils re-refined from crankcase drainings" (Pet. 6a).

Nor is there any substance to the charge that the Commission decision, as affirmed by the court below, converts Section 5 of the Act into a "super-labeling act" authorizing the Commission to require a manufacturer to provide information on any matter in which a consumer might be deemed to have an interest (Pet. 11). The Commission's determination rests upon the narrow proposition that petitioners' silence as to the used-oil origin of the product resulted in a misrepresentation of "a fact highly material and consequential to users and dealers in motor oil" (R. 39).

Finally, there is no merit to petitioners' contention that the Commission could not properly find it in the public interest to protect a consumer's preference for motor oil derived from crude oil since there was no factual basis for the preference. As Mr. Justice Cardozo, speaking for a unanimous Court, stated in *Federal Trade Commission* v. *Algoma Lumber Co.*, *supra* at 78:

> * * * The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. * * * In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance. Nor is the prejudice only to the customer. Dealers and

> manufacturers are prejudiced when orders that would have come to them * * * are diverted to others whose methods are less scrupulous. * * *

If, as petitioners assert, oil refined from used oil is as satisfactory as that produced from crude oil, they are at liberty to accompany disclosure of the nature of their product with appropriate assertions or proof as to its quality. As the court below put it, "[a] manufacturer may not surreptitiously substitute his judgment for that of the purchaser as to the article to be purchased, even if the manufacturer's judgment is equal or even superior to that of the dealer or the customer." (Pet. 5a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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